

New Hampshire Supreme Court
Professional Conduct Committee

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Gallant, John F. advs. Attorney Discipline Office # 04-101

SIX MONTH SUSPENSION – STAYED FOR TWO YEARS

On September 16, 2008, the Professional Conduct Committee heard oral arguments in the above-referenced matter. Landya B. McCafferty, Disciplinary Counsel, appeared for the Attorney Discipline Office. Scott H. Harris, Esquire, appeared on behalf of the Respondent. John F. Gallant, Esquire, was also present.

Members present included: Alan J. Cronheim, Acting Chair in the matter, Toni M. Gray, Vice Chair, Gretchen Rule Hamel, Richard H. Darling, David N. Cole, Marilyn Billings McNamara, and James R. Martin.

The Committee reviewed the record, including: the Notice of Charges; Answer; Stipulation of Facts; Respondent's Hearing Memorandum; Disciplinary Counsel's Memorandum of Law; Transcript of the March 21, 2008, hearing; Hearing Panel Report dated May 5, 2008; Respondent's Memorandum Regarding Proposed Sanction; Disciplinary Counsel's Memorandum on Sanction; Transcript of June 4, 2008 Hearing on Sanction and the Hearing Panel Report dated July 11, 2008.

I. FACTUAL FINDINGS

The Committee voted to accept the Stipulation of Facts dated March 19, 2008, which establishes those facts by clear and convincing evidence. The Stipulation is attached to this Order.

II. RULINGS OF LAW

Based on the Stipulation of Facts and the record in this case, the Professional Conduct Committee concludes that there is clear and convincing evidence that Mr. Gallant violated the following Rules of Professional Conduct by clear and convincing evidence: Rule 3.3(a), Candor Toward the Tribunal; Rule 4.1(a), Truthfulness in Statements to Others; and Rule 8.4(a), Violation of the Rules of Professional Conduct. The Committee declines to find that Mr. Gallant violated Rule 8.4(c), Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation.

Rule 3.3, then in effect, provides in pertinent part:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (3) offer evidence that the lawyer knows to be false. If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 4.1 provides in pertinent part:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person....

Rule 8.4 provides in pertinent part:

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Rule 8.4(a) provides that it is a professional misconduct for a lawyer to violate, or to attempt to violate, any of the Rules of Professional Conduct.

III. ANALYSIS

On July 29, 2003, Mr. Gallant acted as defense counsel in an attachment proceeding in the case of *Deloury Construction Company, Inc. v. Fireside Homesteads, LLC*. Deloury Construction filed for an attachment to secure a potential arbitration award it was seeking against Fireside. Deloury Construction had been hired to build roads and perform certain construction services in a subdivision being developed by Fireside in Pelham, New Hampshire. Deloury Construction claimed it was owed approximately \$120,000.00 for work it had completed. It sought to attach property in the subdivision based on their written contract with Fireside and their belief that Fireside owned the subdivision.

At the attachment hearing, Judge Hampsey questioned counsel about the scope of the attachment and whether it should be issued against the subdivision as a whole or whether it could in some way be limited so as not to impact the entire development. He suggested that the attachment be limited to one lot in the subdivision.

Counsel for Deloury Construction agreed with this approach.

Mr. Gallant, on behalf of Fireside, also agreed with this approach. In response to the Court's questioning, Mr. Gallant stated:

"We can designate one lot to the Court... We can designate or agree between the parties

that whatever the security that the Court may determine is attachable only to that lot. (Exhibit 12-H, Appendix to Stipulation of Facts, Attachment Hearing dated July 29, 2003, pages 403-404.)

Judge Hampsey issued the Attachment Order against Fireside as the named defendant in the case. In fact, Fireside was not the record owner of the subdivision. Instead, it was owned by Heather Lee Lane, LLC.

Following the Attachment Hearing, Mr. Gallant learned that the attachment had not been and could not be properly perfected because it named Fireside, an entity that was not the actual owner of the real estate.

As a result, Mr. Gallant knew that the Attachment Order was of no value to Deloury Construction in regard to securing its potential arbitration award. Mr. Gallant, however, declined to inform opposing counsel or the Court of this information.

Following the time that Mr. Gallant obtained the information that the attachment was of no value, Heather Lee Lane, LLC completed selling all lots in the subdivision. It should be noted that Mr. Gallant or his law firm also represented Heather Lee Lane, LLC.

On or about April 5, 2004, counsel for Fireside asked Mr. Gallant about the subdivision. It was at that time, after Heather Lee Lane, LLC had sold the last of the lots, that Mr. Gallant told opposing counsel that the attachment had not been perfected because it did not name the actual property owner.

Under the factual circumstances of this case, Mr. Gallant had participated in a hearing, responded to questions of the Court and led the Court and opposing counsel to believe that the attachment in question would be valid and would protect Deloury Construction in the event it succeeded in obtaining an award through the arbitration process. His offer to designate a particular lot in the subdivision so that the attachment could be perfected was material to the attachment proceeding and formed the basis for the Court Order. Once Mr. Gallant learned that Fireside had no ownership interest in the subdivision, he was obligated to take reasonable remedial measures to inform the Court and counsel. Yet Mr. Gallant took no such steps. He neither informed opposing counsel or the Court. Instead, he waited to disclose the information until after the lots in question were sold and then only in response to inquiries from opposing counsel.

Mr. Gallant claims that he was prevented from acting out of deference to his client and in order to maintain confidential information.

At a Contempt Hearing held April 15, 2004, wherein Deloury Construction sought a Contempt Order against Fireside for failing to inform them of the failed attachment, Mr. Gallant argued:

...under the case law and under the law in the State of New Hampshire, as well as the Rules of Professional Conduct, it provides that the duty of loyalty to a client not to disclose confidences and to give up a client and its assets to a lawsuit trump the duty to the Court and trump the duty to the third parties...(Exhibit 12-K, Appendix to Stipulation of Facts, Contempt Hearing dated April 15, 2004, page 439)

Mr. Gallant's position is specifically and clearly rejected by Rule 3.3(b). The Rule addresses the issue of confidential client information under Rule 1.6 and provides that the duty to take reasonable remedial measures once a lawyer learns that he has offered false evidence applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." In addition, Mr. Gallant learned that the attachment was not perfected, not as a consequence of a conversation with his client, but rather by reviewing records at the Registry of Deeds. As a result, he obtained the information not in a confidential setting, but through a search of publicly available information.

Mr. Gallant's conduct also violated Rule 4.1(a). The Committee believes that when Mr. Gallant made representations at the Attachment Hearing concerning his willingness to designate a single lot for attachment, that he made those representations with the belief that Fireside had an ownership interest in the property. As a result, there could be no violation of Rule 4.1(a) for statements made to opposing counsel at the hearing because Mr. Gallant believed his representations to be true. Yet at a point when he learned that the statements were inaccurate and untrue, he then had an affirmative duty to correct his misstatements. *See, Carpenito's Case*, 139 NH 168 (1994). As noted earlier, Mr. Gallant's offer to designate a lot for attachment was material and was a statement on which opposing counsel relied.

The Committee declines to find that Mr. Gallant violated Rule 8.4(c). It is the Committee's view that Rules 3.3(a) and 4.1(a) more accurately describe Mr. Gallant's conduct in this case. The Committee notes that the Hearing Panel found by clear and convincing evidence that "any conduct by [Mr. Gallant] which derogated the agreement reached on July 29, 2003 was 'conduct involving dishonesty, fraud, deceit or misrepresentation.'" It is the Committee's view that the Panel's interpretation of Rule 8.4(c) is too broad and that in this instance, a finding of misconduct pursuant to Rule 3.3(a) and 4.1(a) better describe the circumstances of this case.

Mr. Gallant, once he knew of the flawed attachment, neither corrected the record in Court, nor did he disclose the information to opposing counsel. As a result, the Committee believes it is appropriate to focus on violation of the Rules related to candor to the tribunal and statements to others. A finding of a violation of Rule 3.3(a) or 4.1(a) does not automatically require a finding of a violation of Rule 8.4(c), *see Carpenito's Case*, *id* at 173-174, and the Committee declines to make such a finding in this case.

IV. SANCTION

Having made the aforementioned findings and rulings, the Professional Conduct Committee concludes that the appropriate discipline in this matter is a six month suspension with

the suspension being stayed for a period of two years. This sanction is in accord with the purposes of attorney discipline as described by the New Hampshire Supreme Court. *See, e.g., Feld's Case*, 149 N.H. 19, 28 (2002). This sanction is also in accord with the ABA Center for Professional Responsibility, *Standards for Imposing Lawyer Sanctions* (1991). *See, e.g., Shillen's Case*, 149 N.H. 132, 139 (2003) (noting that, although the Court has never formally adopted these Standards, the Court has considered them when imposing sanctions).

Disciplinary action and sanctions are not intended as a mode of inflicting punishment. *Kersey's Case*, 150 N.H. 585, 585 (2004). Rather, the purpose of the Court's disciplinary power "is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *E.g. Coffey's Case*, 152 N.H. 503, 513 (2005) (internal quotation marks omitted). "The sanction must take into account the severity of the misconduct." *Id.*

The New Hampshire Supreme Court and this Committee look to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992) ("*Standards*") for guidance to determine the baseline sanction. *Coffey's Case*, 152 N.H. at 513. The *Standards* set forth four factors to consider in imposing sanctions: "(a) duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." *Standards* Section 3.0; *Coffey's Case*, 152 N.H. at 513.

One of the main tenants of our judicial system is candor to the tribunal. *See, e.g., Kalil's Case*, 146 N.H. 466, 467 (2001). "The confidence of judges to rely with certainty upon the word of attorneys forms the very bedrock of our judicial system." By failing to timely correct the facts presented at the attachment hearing and the resulting Court Order, as the subdivision lots which *could* have provided security were sold, Mr. Gallant violated his obligations of candor to the Court and to plaintiff. His actions serve only to cause the public to lose confidence in the judicial system.

The Committee believes that the baseline sanction in this case is a suspension. We make this conclusion based on our view that Mr. Gallant had a duty to disclose to the Court and opposing counsel that the Court's Order of Attachment had no legal effect. Mr. Gallant knew the attachment had not been and could not be properly perfected and knew that opposing counsel had relied on his offer to designate a single lot to provide security for Deloury Construction. Mr. Gallant further knew that Deloury Construction's reliance on his representation could have impeded its effort to enforce a potential arbitration award.

Section 6.12 of the *Standards* provides:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Having found that the baseline sanction in this case is a suspension, the Committee must weigh aggravating and mitigating factors in the case. Here, the mitigating factors strongly outweigh aggravating factors. It appears that Mr. Gallant did not correct the record in the case in order to maintain his client relationship for as long as possible. Further, as disciplinary counsel noted, he has substantial experience in the practice of law. *See, Standards*, 9.22 (b) and (i). But more critical to the Committee's judgment in this case, Mr. Gallant has expressed remorse regarding his choices in this case and has indicated he would now handle a similar situation differently by making necessary disclosures to opposing counsel and the Court. Further, he introduced evidence at the Sanction Hearing of his good character and of his reputation for care and competence in his work. He has no prior infractions before these events and has no infractions in the more than 5 years that has passed since these events. He has cooperated with disciplinary counsel in the investigation of the case and has demonstrated an awareness of his obligations under the Rules, an awareness that clearly did not exist in 2003. *See, Standards* 9.32 (a), (e), (g), (j) and (l).

In weighing the Rules violated along with Mr. Gallant's history and response to these charges, the Committee concludes that Mr. Gallant should be suspended for a period of 6 months, however, the suspension should be stayed for a period of two years.

V. CONCLUSION

Based on the record presented, the Professional Conduct Committee finds by clear and convincing evidence that Mr. Gallant violated N.H. R. Prof. Conduct Rules 3.3(a), 4.1(a) and 8.4(a). The Committee declines to find a violation of Rule 8.4(c).

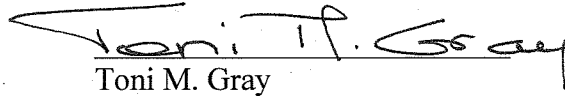
Mr. Gallant is suspended for a period of 6 months, however, this suspension is stayed for a period of two years from the date of this Order. If Mr. Gallant does not violate the Rules of Professional Conduct during this two year period, the suspension shall not be imposed. If Mr. Gallant violates the Rules during this time, the Committee shall schedule a further hearing to determine whether a portion or all of the 6 month suspension shall be imposed. If a grievance is filed but remains unresolved during this two year period, the stay of the suspension shall be extended until such time as the grievance is resolved.

Mr. Gallant is assessed all costs associated with the investigation and prosecution of this matter.

VI. RIGHT TO APPEAL

Pursuant to Supreme Court Rule 37(A)(III)(d)(2)(D)(4)(A), the parties have the right to appeal this decision to the New Hampshire Supreme Court. *See also* Supreme Court Rule 37(3)(c).

January 27, 2009

A handwritten signature in black ink that reads "Toni M. Gray". The signature is written in a cursive style with a large, sweeping initial "T".

Toni M. Gray
Vice Chair

Distribution:

- Landya B. McCafferty, Disciplinary Counsel
- Scott H. Harris, Esquire
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